No. 247.

Brief of Atty. Gen. (Thompson & Cotteral) for Appellees

Filed Mar. 30, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM M. PRICE, ADMINISTRATOR of the estate of Henry C. Miller, deceased, appellant,
v.
THE UNITED STATES AND THE OSAGE Indians, appellees.

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STATEMENT OF THE CASE.

The facts in this case, as shown by the record, are as follows:

In the year 1847 Henry C. Miller and P. W. Thompson, who were not partners, started from western Missouri to New Mexico with an ox train loaded with merchandise of the alleged value of $1300.

On the 26th of June, 1847, near the Arkansas River, in what is now the State of Kansas, Indians belonging to the Osage tribe took and drove away 32 head of oxen, the property of the appellant.

At the time of the taking, the oxen were being used by appellant's decedent in transporting his wagons and merchandise along the route aforesaid, and in consequence of the taking and driving away of said oxen he was compelled to abandon his trip and sell his merchandise and four wagons for the sum of $1,200.

The claim was presented to the Interior Department and allowed for the sum of ~~$7,800~~ $8,200, of which sum $6,800 was allowed to Miller and $1,400 was allowed to Thompson.

That allowance constituted the claim "allowed" under the Indian depredation act of March 3, 1891, and upon which the claimant in the court below was entitled to judgment unless such allowance was reopened, which action was taken by the defendants.

The finding of the Interior Department, as to the value of the property, was followed by the Court of Claims, showing that the value of the property of appellant's decedent was $6800, the merchandise and wagons being worth $———, and the value of the oxen $400.

The Court of Claims awarded judgment for the value of the oxen, but disallowed the claim for the value of the merchandise and the wagons, finding, as a conclusion of law—

> The petition as to the claim for goods and wagons belonging to claimant's decedent and disposed of as set forth in Finding II is dismissed for want of jurisdiction.

In their opinion (pp. 10, 11, 12) upon this point, Chief Justice Nott says:

> The statute of 1891 provides as its first and fundamental grant of power that the court shall

have jurisdiction, first, "All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States without just cause or provocation on the part of the owner or the agent in charge and not returned and paid for."

The depredation which Congress intended to afford a remedy for by the act of 1891 is limited by the words "taken or destroyed," and is, therefore, necessarily circumscribed by that limitation to property which has been absolutely lost, either by theft or destruction. The act was not intended to cover consequential damages which might have ensued to a claimant as an incident to the raid on his property and for which there might be a recovery against a wrongdoer at common law. The court, in the construction of that section of the statute, has confined the liability of the defendants to the value of the property actually taken or destroyed, and has not allowed consequential damages resulting from the commission of the depredation.

In the case of *Brice* v. *The United States and the Cheyenne and Arapahoe Indians* (32 C. Cls. R., 23) it is said, in reference to the act of 1834, "the Secretary of the Interior had no authority to adjust and allow a claim for consequential damages growing out of the taking of property, and was therefore confined to the consideration of the claim for the value of the mules alleged to have been stolen."

In this case, so far as the raid of the Indians affected the condition, the goods of claimants were untouched; they remained intrinsically, so far as condition is concerned, in the same state that they were antecedent to the raid and depredation of the defendant Indians.

The effect of the raid was not to destroy or damage the property by diminishing its quality or its

quantity, but had the consequential effect of diminishing its value by producing a condition the effect of which was to decrease its commercial worth in precipitating its sale at a place where there was no market in the form of competition.

They did not take or destroy the property of the claimant, but deteriorated its value, as the incidental and consequential result of their raid. The court decides that the claimant is entitled to recover the value of the oxen, but no allowance is made for the damages to the goods, for the reasons stated in the foregoing opinion.

The appellant urges:

First. That the case being one "allowed" under the act of 1886, and "preferred" by the terms of section 5 of the Indian depredation act of March 3, 1891, and entitled to judgment unless reopened. When reopened by the defendants, the burden of proof being upon the party reopening, judgment for the amount of the allowance shall be rendered, unless there is new testimony adduced overturning the prima facie case existing by reason of the allowance of the Secretary of the Interior.

Second. That the Court of Claims erred in holding that the act of March 3, 1891, limits the jurisdiction of the court to cases or claims for "property taken or destroyed."

Appellant contends that such *damages* as his decedent suffered is within the terms of the act giving the court jurisdiction to inquire into and finally adjudicate * * * all claims for property * * * taken or destroyed by Indians, etc.

I.

We think the reasoning of appellant upon the first question is unsound and not in harmony with either the

language or intent of section 5 of the act of March 3, 1891, wherein it is—

> *Provided*, That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless the claimant or the United States shall elect to reopen the case and try the same before the court, * * * and
>
> *Provided*, That the party electing to reopen the case shall assume the burden of proof.

The last proviso of that section relates to the determination of the *facts* of the case and not the law.

Defendants reopened the case and presented the same as if the question was raised by demurrer.

They admitted the facts that a loss had been suffered by the act of the defendant Indians, but contended under the law of the case, as to a portion of the claim, that the court had no jurisdiction.

This question might have been raised by a plea to the jurisdiction of the court, but under the liberal rules of the Court of Claims the defense may be made under the plea of general issue. The practice is optional with the defendants.

The court has permitted the law of the case to be settled in advance of an election to reopen. (*Moore* v. *United*

States, 32 C. Cls. R., 593; *McKee* v. *United States*, 33 C. Cls. R., 99.)

In re Mares (29 C. Cls. R., p. 197), which was an allowed claim, the defendants moved to dismiss claimant's election to reopen upon the ground that the Secretary of the Interior had no authority to allow the claim.

That motion was allowed by the court.

In re Labadie, administrator, which was an allowed claim, the court permitted the defendants to plead set-off without reopening the case. (31 C. Cls. R., p. 436; 32 C. Cls. R., p. 368.)

This practice of the Court of Claims is sound. Defendants have a right to determine the law of the case in advance of even an election to reopen.

Having this right, it necessarily follows that after a case is reopened they have a right to a determination of the law of the case before any consideration can be given to the facts.

It is thought that the reply to this contention first made under this head is a complete answer, assuming that the burden of proof carries with it nothing more than the onus as to the facts.

Upon the facts there is no controversy. The commission of the depredation is alleged. The taking and driving away of decedent's oxen, the sale of his wagons and goods for the sum shown, and their value as found by the Secretary of the Interior are all admitted facts.

Liabilities under the act of March 3, 1891, and the jurisdiction of the court to "inquire into and finally adjudicate" a claim for depredation, are questions of law, for determination by the court, in which determination

the character of the case, whether original or "allowed," "preferred" or unpreferred, reopened or standing upon the allowance made by the Interior Department, is wholly immaterial.

If the law of the case is with the appellants, the claim having been reopened by the defendants, and no new evidence having been adduced to overturn the finding of the Secretary upon the facts of the case, he should have judgment in the court below.

If this contention be sound, the main and only question presented by the record is under the second subdivision of the case.

II.

The Indian depredation act of 1891 provides for payment for property "*taken* or *destroyed*" by Indians belonging to any band, tribe, or nation, etc.

The act of 1885 provides for investigation of claims for property "*damaged* or *destroyed*."

The defendant Indians contend that the change made in the act of 1891 from that of the act of 1885 is significant; that the Indians were not to be thereafter required to pay for mere damages to property, *consequential* or *otherwise*, but that only the property actually "*taken*" or actually "*destroyed*" by Indians should be paid for, and the jurisdiction of the court was so limited.

The word "taken" in the act of 1891 means that there has been a corporeal taking hold of and carrying away of the property itself and appropriating the same to the use of the taker, so that the Indians who thus took the property got the use and benefit of it.

Because the Indians actually took and carried away the oxen belonging to the appellant's decedent does not prove that the same Indians took any other property from him.

The allegations of the petition in the court below, found in this record, page 3, are that on the 24th day of June, 1847, the Indians made an attack on the stock belonging to appellant's decedent, wounding one yoke of oxen, and that on the 26th day of the same month said Indians "then and there took from and drove off twenty and one-half (20½) yoke of oxen, belonging to Henry C. Miller and Phillip W. Thompson." And in a prior allegation in the same petition (p. 3) it is stated that said parties had in their said train 22 yoke of oxen. It is not shown that there was any attempt on the part of the Indians to take or carry away or destroy any of the property of the appellant's decedent except the oxen, and in no way did they interfere with the wagons or merchandise.

The contention of the appellant is, not that the Indians actually took the wagons and merchandise, nor that they destroyed the same, but that the taking of the oxen resulted in preventing him from getting his merchandise to market, thereby depreciating the value of it.

In support of this contention, appellant's brief cites case of *Pumpelly* v. *Green Bay Co.* (13 Wallace, 166), wherein it is shown that there was actually a *taking* of the land without just compensation. Reference is also made to Cooley's Constitutional Limitations, wherein it is asserted that "any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking."

It is respectfully submitted that no general rule of construction of the Constitution is applicable to the construction of the Indian depredation act of March 3, 1891.

It is an act passed to meet a peculiar condition, affording a special remedy for such condition, and is to be construed in strict accordance with the conditions it was framed to meet.

Just what application, therefore, the fine distinctions of the meaning of the word "taking," discussed in the said cited cases, has to the meaning of the word "taken" in the Indian depredation act is not clear, and especially so since it is *not* claimed in this case that there was a taking in any sense of the wagons or merchandise.

III.

Having discussed the meaning of the word "taken," as used in the Indian depredation act, let us now consider the word "destroyed," as used in said act. The sentence in which that word is found is as follows: * * * "For property of citizens * * * destroyed by Indians," etc., * * * .

The law in question is not at all ambiguous, but on the other hand it is clear and not open to debate. It is remedial in its nature, but remedial only to the extent of the words in the act and is restrictive accordingly.

This court said in the case of *Leighton* v. *The United States et al.* (161 U. S. R., p. 291):

> * * * Before any judgment should be rendered binding the United States, it is a familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate.

In *Marks* v. *The United States* (U. S. R., 161, p. 297), Mr. Justice Brewer, for the Supreme Court, said:

> Again, as often affirmed in the decisions of this court, the Indians are, in a certain sense, the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit. * * *

In conferring jurisdiction upon the Court of Claims for the determination and adjudication of the rights of claimants for depredations committed by Indians many limitations and restrictions are to be found in the act, and the Court of Claims, as well as this court, has uniformly held to a strict construction of said act.

The right to recover has been limited in the first clause of the act to citizens of the United States. Amity is a condition of both the jurisdiction of the court under the first clause of the act and as a defense under the second.

Congress evidently intended also to limit the right of recovery to claims for *property taken or destroyed.* If Congress had intended to open the jurisdiction of damage arising out of Indian depredations it would have said so in the act. The reasons for limiting the rights of claimant to claims for property taken or destroyed are manifold. In the first place the same measure of damages is not applicable to suits against the United States that finds place in controversies of this kind in suits between individuals. Again, Congress did not intend to leave open questions covering the vast domain of damages for the determination of the court, but rather to limit the court's jurisdiction, as was plainly done by the words employed in the act.

The Court of Claims has limited its jurisdiction to claims for property taken and destroyed in cases other than the one at bar. In *Swope* v. *The United States* (33 C. Cls. R., p. 223) and in *Friend* v. *The United States* (29 C. Cls. R., p. 425) the Court of Claims held that they had no jurisdiction over suits for damages by reason of personal injury.

If counsel may be permitted to make the statement (and this court is authorized to take judicial notice of matters of public record), the Court of Claims has uniformly refused to take jurisdiction for any claims other than those for property taken and destroyed. They have refused to allow for damage to crops where the same have been abandoned by reason of the hostile or unlawful acts of the Indians; they have refused to allow for expenses incident to the recovery of stock taken by the Indians. As has hereinbefore been stated, they have limited their jurisdiction to cases falling strictly within the language of the Indian depredation act of March 3, 1891.

In the claim in controversy the Indians did not *take* the wagons or merchandise. They did not use or carry away the same. They did not in any way change the corporeal existence of the property or interfere with appellant's possession of it.

The Indians did not destroy the corporeal property. The property remained intact in possession of appellant's decedent precisely as before the Indians had taken the oxen. How, therefore, can the Indians be held liable for profits or losses on merchandise which was neither "taken" nor "*destroyed?*"

There is no question of *damage* in the case. The act referred to eliminates "damages" from the consideration of the court.

Appellant's brief says that the act of 1885 is explicitly referred to in the act of 1891. So it is; but it is referred to to be repealed by a restriction upon the court's jurisdiction; and wherever the act of 1891 differs from that of 1885 the difference is material and significant, because it was determined to make it different. Damages, in their true sense, are not provided for in the Indian depredation act.

The Indian depredation act proceeds on the theory of making compensation for the property actually taken or actually destroyed.

It can in no case meet the actual damages sustained by the loser of the property, such as his inconvenience, loss of time, anxiety of mind, and gains prevented. The act was framed to treat only of those tangible things the value of which may be determined with reasonable certainty. All speculative matters are eliminated from consideration.

Once the door of speculation is opened, these claims would expand to unrecognizable proportions.

In the passage of this act there was no attempt to provide for profits or loss of profits of goods "taken or destroyed," but by the substitution of the word "taken," in the act of 1891 for the word "damaged" in the act of 1885, all speculative damages were discontinued.

It is much easier to expand the supposed value of a thing than the real value.

The value of the goods actually *taken* by the Indians

is great enough, without charging them up with the value of the goods they did not take.

It is enough to charge the Indians with the value of the goods they actually *destroyed*, and it is too much to charge them with the value of goods they did not destroy.

What a chance for speculation in this case!

Why did he not hire the trader (to whom he sold his goods for $1,200) to take his merchandise to Santa Fe? The trader bought them. He could have taken them for appellant.

Because appellant did not do what he might have done, because he did not buy transportation and save the value of his goods, is no reason why the Indians should be charged with his losses.

The Indian depredation act wisely and designedly eliminated the field of pure speculation, and fixed the sole right and remedy upon the goods and property actually taken or actually destroyed by Indians belonging to a tribe or band in amity with the United States.

The theories of damages so well set forth in appellant's brief are without application here. They belong to cases involving the subject-matter they treat. They do not fit an Indian depredation case under the act of March 3, 1891.

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